Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF COLLEGE OF NOTRE DAME OF MARYLAND, INC.

GEORGE W. CONSTABLE,
1000 Maryland Trust Bldg.,
Baltimore, Maryland 21202,
Counsel for Appellee.

The Daily Record Co., Baltimore, Md. 21202

Table of Contents

	PAGE
Questions Presented	2
Statement	2
Argument:	
I. Entanglement	3
II. Primary Effect	5
Conclusion	7

Table of Authorities

Cases

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	4
Hunt v. McNair, 413 U.S. 734 (1973)	4, 6
Tilton v. Richardson, 403 U.S. 672 (1971)	3, 4, 7

State Statutes

Maryland Annotated Code, Art. 77A, Secs. 65 et seq.	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellee, College of Notre Dame of Maryland, Inc., pursuant to Rule 16 of the Supreme Court of the United States, moves the Court to affirm the judgment of the District Court of three judges in the United States District Court for the District of Maryland, on the grounds that the questions are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

Whether or not the District Court made a substantial error in its determination that the Maryland State aid to the Appellees did not violate two of the three specific tests established by the Supreme Court, viz:

A. The test that the aid should not foster excessive government entanglement with religion; and

B. The test that the aid should not have the primary effect of advancing religion.

The third test viz: that the legislative purpose be secular, has been conceded to have been met.

The question of a refund is not a substantial question in itself, but would only arise if the aid program is found unconstitutional by the Supreme Court.

STATEMENT

This is an appeal from the judgment of a three judge court finding (1) that the Maryland program for state aid to colleges (Maryland Annotated Code, Art. 77A, Section 65, et seq.) is constitutional on its face and as applied; (2) that the Appellants motion for an injunction against payments to Appellees is denied; and (3) that the Appellants motion for a refund of aid previously paid out is denied.

There was an exhaustive inquiry into the facts of the State program and into the nature and operations of each of the colleges who are Defendants in the case. This resulted in Findings of Fact by Judge Young which were subsequently adopted by the three judge District Court and constituted the sole factual basis upon which the opinion rested.

These finding establish that the Appellees are typical church-related liberal arts colleges very similar to those

involved in the case of *Tilton v. Richardson*, 403 U.S. 672 (1971); that they are not sectarian institutions, nor arms of any church, nor indoctrinating and proselytizing institutions; that such religious features as there are — such as chapels and theology courses — are typical of many liberal arts colleges and universities which concededly are not deemed sectarian; that such religious opportunities as are afforded are on a voluntary, non-compulsory basis; and that there are no religious quotas or requirements in faculty selection or student admissions.

ARGUMENT

There is no question raised by the Appellants in this Appeal as to what the basic tests of constitutionality are, nor as to the factors to be considered in applying these tests. Nor is there any serious question about the facts to which these tests and factors are to be applied; nor as to the guiding examples of application given by the Supreme Court in the leading cases.

The essential argument by the Appellant is that these tests and factors have not been properly applied by the District Court; and this in two respects.

I.

ENTANGLEMENT

Appellants argue that the State aid in this case would involve excessive government entanglement with religion, because unlike the situation in the *Tilton* case (a) the grants are not for "religiously neutral facilities" and (b) the grants are not one time, single purpose grants but involve on-going annual grants which would require continuous governmental audits and judgmental monitoring of the institutions.

Both of these points were fully and directly dealt with by the District Court.

As to (a) it was pointed out that the distinction between *Tilton* and this case was more apparent than real. The difference between specific "construction grants" for buildings intended for secular use and grants which are "non-categorical" (i.e., non-specific) as to type of secular use but which are restricted by a general, all-encompassing legal prohibition against use for any sectarian purpose whatever is a distinction which "does not rise to constitutional dimensions" (A-17 of Opinion in Appellants' Jurisdictional Statement). After all, it is not the building, but *what happens in the building over the years*, that gives rise to the possibility of entanglement. As the District Court said "The classroom building provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist*" (A-15).

The Appellants are attempting to convert the Supreme Court's observations in the *Tilton* case to the effect that payments for "ideologically neutral" buildings "reduced" the danger of entanglement (p. 686) into a formal Supreme Court requirement for constitutional validity of a grant.

As to (b), i.e., the danger arising out of on-going financial entanglement because the aid is not in the form of a single grant, again the District Court fully considered this and found that the continuing nature of the grants was not constitutionally fatal. For, after all, even in *Tilton*, where one time construction grants were permissible, there would obviously be

> "required a continuing and perpetual involvement of the government with the schools to ensure that publicly financed buildings would never be used for sectarian purposes" (A-20).

Further, as the District Court noted, in *Hunt v. McNair*, 413 U.S. 734 (1973)

> "the Supreme Court found the South Carolina Statute to be constitutional even though it established a school

> governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration" (A-20-21).

And of course, many constitutionally permissible forms of state aid are on-going, annual programs involving continuing financial relationships — viz, aid for school textbooks, lunches, health programs, school buses, etc.

In short, neither the absence of a limitation of a grant for a single supposedly "neutral" building nor the presence of an on-going program are significant points under the existing tests and the applications thereof, developed by the Supreme Court. The District Court arrived at its decision by applying these tests and the related factors laid down by the Supreme Court, to the facts — including the facts that the institutions were at college rather than high school or elementary school level; that the institutions were non-sectarian liberal arts colleges; that the law provided a flat and all embracing prohibition against any use of the funds for sectarian purposes; and that the program was administered by a state agency capable of establishing adequate regulations and procedures to ensure such required use of the funds without undue surveillance.

II.

PRIMARY EFFECT

The Appellants secondly argue that the *primary effect* of the State aid was to advance religion in that (a) the aid program failed to guarantee that the funds would not advance religion in respect to use for teachers salaries, scholarships and maintenance of buildings; (b) the funds would support classes where prayers were sometime said, albeit voluntarily; (c) the fund were in support of institutions with alleged religious restrictions on faculty appointments (not true) and on student admissions (not true); and (d) the funds would support institutions which have a few compulsory theology

courses and which provide some religious opportunities and services on a voluntary basis.

Here again the District Court has fully dealt with the problem in the light of the principles laid down by the Supreme Court and in the light of the guiding applications thereof by the Supreme Court in the leading cases. The Supreme Court in *Hunt v. McNair*, *supra*, p. 743, has distinguished two applications of the "primary effect" rule:

> 1. There can be no aid to an institution which is essentially sectarian. It is clear from the Findings of Fact and the Opinion (including the dissent) that this is inapplicable to the Appellee institutions in this case; and
>
> 2. There can be no aid which funds a specifically religious activity in an otherwise substantially secular setting.

It is chiefly this last principle which Appellants charge to be violated in this case. Basically, the answer to Appellants charge is that: (a) the Appellee institutions are essentially secular; (b) that any sectarian activities are clearly separable from the secular activity; (c) that the State aid statute specifically forbids use of the fund for sectarian purposes; and (d) that the administrative agency is adequate to screen institutions and to verify and enforce this required secular use.

In short, both the spirit and letter of the Supreme Court's tests have been complied with. If the funds are, or will be, used exclusively for non-sectarian purposes, as they must be under the law, it can hardly be said that they are, or will be, used to advance religion in any of the senses charged by the Appellants.

As far as primary effect is concerned, there is no logical difference between a grant for specific secularly-used buildings (as in *Tilton*) and a grant for a range of possible secular purposes. A secular purpose is a secular purpose in either case. The only essential point is that the grant be earmarked and used for secular purposes. There is nothing in the cases, or law, or in logic, that makes it essential that the particular, specific use of the fund within the ambit of all possible secular uses be fixed at the legislative level. In fact, it would seem highly desirable to permit aided colleges to have flexibility of use within the constitutionally permissible range of secular uses, as long as there is adequate regulatory provision for accurate and relatively simple checking out of proper use. In any event the tests do not prescribe this.

CONCLUSION

In summary, it is suggested that the Appellants have not presented any issues or questions not already adequately decided under tests, and related factors, and applications evolved by the Supreme Court and followed by the District Court. To warrant a Supreme Court review would seem either to call for some clear departure by the District Court from these tests and related factors or to call for a showing that these tests and factors in the light of applications in the *Tilton*, *Hunt* and other cases, are not adequate to determine the issue. It is submitted that neither has been shown.

Respectfully submitted,

GEORGE W. CONSTABLE,
1000 Maryland Trust Bldg.,
Baltimore, Maryland 21202,
Counsel for Appellee.

January 10, 1975.